

Investigation by the Department of Telecommunications
and Energy on its own Motion into the Appropriate
Regulatory Plan to succeed Price Cap Regulation for
Verizon New England, Inc. d/b/a Verizon Massachusetts’
intrastate retail telecommunications services in
the Commonwealth of Massachusetts

HEARING OFFICER RULING ON MOTION OF THE ATTORNEY GENERAL TO
STRIKE PORTIONS OF AT&T'S REPLY BRIEF

On December 6, 2002, the Attorney General for the Commonwealth of Massachusetts (“Attorney General” or “AG”) filed with the Department of Telecommunications and Energy (“Department”) a Motion to Strike Portions of the Reply Brief of AT&T (“AG Motion to Strike”). On December 13, 2002, AT&T Communications of New England, Inc. (“AT&T”) filed an opposition to the Attorney General’s Motion to Strike (“AT&T Opposition”).

A. Attorney General

In his Motion to Strike, the Attorney General argues that portions of AT&T's Reply Brief include, and refer to, extra-record evidence, and, thus, must be stricken consistent with Department regulations and precedent (AG Motion to Strike at 1-2). The Attorney General argues that AT&T's attachment of a 1987 article from Public Utilities Fortnightly to its reply brief, and references in the brief to the article, have prejudiced the rights of other parties, as other parties do not have the opportunity to conduct cross-examination or to test the accuracy of the data contained in the article through the litigation process (*id.* at 2-3). Allowing AT&T to cite to, reference, or otherwise rely on extra-record evidence, argues the Attorney General, violates his, and other parties', due process rights (*id.* at 3). Moreover, the Attorney General argues that even if AT&T had followed proper procedure and moved to re-open the record to admit the Public Utilities Fortnightly article, there is no good cause to admit it (*id.*). Therefore, the Attorney General asserts that the Department should strike the extra-record portions of AT&T's reply brief and require AT&T to file a conforming brief, or, alternatively, the Department should disregard the offending portions of AT&T's reply brief when reaching its decision in this case (*id.* at 3-4).

B. AT&T

In its opposition to the Attorney General's Motion to Strike, AT&T argues that the Department should deny the Attorney General's motion (AT&T Opposition at 1). AT&T argues that the Public Utilities Fortnightly article attached to its reply brief is not evidence, but is rather more in the nature of a law review article, which can be cited as part of an argument (id. at 2). AT&T points out that the Department regularly cites to extra-record academic authority, and did so throughout the Department's Phase I Order in this proceeding (id. at 2-3). Moreover, AT&T argues that no party was prejudiced by AT&T's reference to the article in its reply brief because the article constituted only additional argument in support of a proposition that was advanced well before the hearings, and, therefore, AT&T asserts that the Attorney General's motion is an improper attempt to strike an argument that is already in the record of this proceeding (id. at 3-4). In addition, AT&T argues that because the article contains no empirical data or factual conclusions, the Attorney General is likewise not prejudiced by his inability to cross-examine or rebut the conclusions contained within the article (id.).

III. ANALYSIS AND FINDINGS

For the following reasons, I grant the Attorney General's Motion to Strike. It is axiomatic that a party's post-hearing brief may not serve the purpose of presenting facts or other evidence that is not in the record. As the Department stated in Boston Gas Company, D.P.U. 88-67, at 7 (Phase II) (1989), "A party's presentation of extra-record evidence to the fact-finder after the record has closed is an unacceptable tactic that is potentially prejudicial to the rights of other parties even when the evidence is excluded." Moreover, the Department's position on extra-record evidence presented on brief was discussed at length in AT&T Alternative Regulation, D.P.U. 91-79, at 5-11 (1992), a case with which the parties in this proceeding are very familiar. In that Order, the Department discussed a "scholarly writings" exception to the Department's exclusion of extra-record evidence, stating:

[W]e recognize that, in the proper circumstances, parties may rely on extra-record "scholarly writings" for the purpose of identifying general principles, descriptions, or definitions. Nevertheless, such extra-record "scholarly writings" may not be used to present facts in dispute. . . . [I]t will be important that the material be available to the parties to the case, and that the parties have fair notice of its use.

Id. at 11. While the Public Utilities Fortnightly article included in AT&T's reply brief may indeed constitute a "scholarly writing," none of the proper circumstances required for an exception to the exclusion of extra-record evidence are present here. Most importantly, AT&T included the article not for the purpose of identifying general principles or definitions, but to support its position regarding the proper allocation of loop costs, an issue in dispute in this phase of our proceeding. In addition, AT&T referenced the article only in its reply brief, also depriving opposing parties of fair notice of its use. Further, AT&T entered a number of

similar scholarly writings as evidence in this proceeding (see Exhs. ATT-1, Atts. B, C; ATT-3; ATT-4; ATT-5; DTE-ATT 4-1, Tabs 1-4), yet offered no explanation for its failure to introduce the Public Utilities Fortnightly article during the hearings.

In sum, I agree to strike the 1987 Public Utilities Fortnightly article attached to AT&T's reply brief and the reference to the article on page 12 of AT&T's reply brief. The Department will disregard those portions of AT&T's reply brief in reaching its decision in this case.

IV. RULING

The Attorney General's Motion to Strike Portions of AT&T's Reply Brief is granted.

Under the provisions of 220 C.M.R. § 1.06(6)(d)(3), any party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation within five (5) days of this Ruling. Any appeal must include a copy of this Ruling.

Date: December 19, 2002

_____/s/_____
Paula Foley, Hearing Officer